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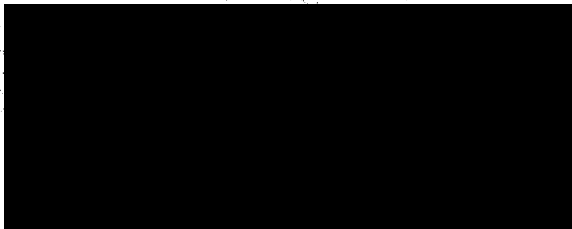
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**U.S. Citizenship
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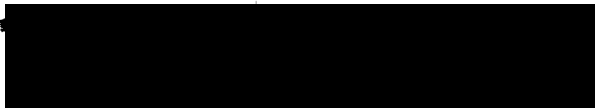
Office: CALIFORNIA SERVICE CENTER

Date: **SEP 23 2004**

IN RE:

Petitioner:

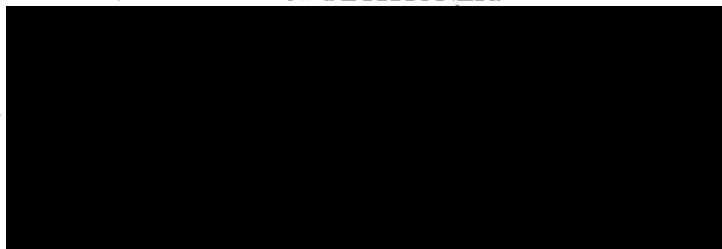
Beneficiary:



PETITION:

Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a multi-specialty ambulatory surgical center. It seeks to employ the beneficiary permanently in the United States as a physical therapist. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I (Schedule A). The petitioner submitted the Application for Alien Employment Certification (ETA 750) under Schedule A to Citizenship and Immigration Services (CIS), formerly the Service or INS, with the Immigrant Petition for Alien Worker (I-140).¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns on the petitioner's ability to pay the proffered wage and on the petitioner's qualification for a blanket labor certification, in respect to the beneficiary, as of priority date. Employment-based petitions depend on priority dates. For Schedule A petitions, the filing of the I-140 petition with Citizenship and Immigration Services (CIS), formerly the Service or the INS, establishes the priority date. *See* 8 C.F.R. § 204.5(d), 20 C.F.R. § 656.22(a). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. *See* 8 C.F.R. § 103.2(b)(1).

For reasons discussed below, the petitioner has failed to establish either its ability to pay the proffered wage or its qualification for the blanket labor certification. The petition's priority date in this instance is November 15, 2002. The beneficiary's salary as stated on ETA 750 is \$21 per hour or \$43,680 per year.

The director considered as insufficient the initial evidence that the petitioner submitted in respect to its ability to pay the proffered wage and for the labor certification under Schedule A. Regulations provide for the submission of Forms ETA 750 for Schedule A occupations directly to CIS and authorize CIS to determine the petitioner's compliance with the requirements for a properly filed I-140 petition.² In a request for evidence dated April 15, 2003 (RFE-1), the director exacted federal tax returns, annual reports, or audited financial statements from the priority date to the present. RFE-1, also, required either the beneficiary's license, or the statement of the physical therapy licensing official in the state of the intended employment to the effect that the beneficiary has qualified to take that state's written licensing examination for physical therapists.³

¹ *See* 20 C.F.R. §§ 656.10(a)(1) and 656.22 (a).

² *See* 20 C.F.R. §§ 656.22(a), 656.22(c) and 656.22(e) and 8 C.F.R. §§ 204.5(a)(2), (d), and (g)(1).

³ *See* 20 C.F.R. § 656.22(c)(1).

In response to RFE-1, the petitioner gave evidence of the ability to pay the proffered wage in exhibits A-C. They encompassed the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, and a bank statement for the current period, ending May 31, 2003. Further, a bank letter, dated June 19, 2003, covered the period from November 15, 2002 to May 31, 2003 (bank certification). It certified the petitioner's minimum daily balance as \$220,989 and average daily balance as \$176,584.

In response to RFE-1, the petitioner produced a notice to the beneficiary from the Physical Therapy Board of California (California Board), dated August 21, 2002 (August 21, 2002 notice), acknowledging that the beneficiary could proceed with pertinent examinations. It emphatically advised that the beneficiary must meet deadlines for examinations in regard to two (2) authorizations to test (ATT).⁴ The California Board designated the Federation of State Boards of Physical Therapy (FSBPT) to administer both the CLE and NFTE tests. See n. 4. The August 21, 2002 notice warned, however, that the beneficiary could not work as a physical therapist license applicant, but only as an aide, until both tests were passed. Moreover, the California Board established a one-year limit to complete both the CLE and the NFTE tests, namely, August 20, 2003. After that, the August 21, 2002 notice exacted a new application, fees, and documents.⁵

The director issued another request for evidence dated November 3, 2003 (RFE-2). It exacted evidence of the current prevailing wage for the position described on Form ETA 750. RFE-2 insisted on complete, legible, and signed federal tax returns or annual reports with audited financial statements for 2001-2002, an IRS printout of the 2002 federal tax return, and bank statements from the priority date. In addition, RFE-2 requested data from the last four (4) quarterly wage reports (Forms DE-6) to substantiate the petitioner's number of employees. Finally, RFE-2 specified the format of letters and type of evidence to substantiate the beneficiary's previous experience in the job offered, as listed on Form ETA 750.

In response to RFE-2, the petitioner presented a prevailing wage determination of the California Employment Development Department (EDD wage). It established an EDD wage at \$36.11 per hour, based on the petitioner's description of the proffered position for a physical therapist, skill level 2. An unsigned copy of the tax return, the 2002 Form 1120, reported taxable income before net operating loss deduction and special deductions of \$4,135, less than the proffered wage. Schedule L of Form 1120 stated the difference of current assets, \$0, minus current liabilities, \$263,947. The remainder, net current assets, was a deficit of (\$263,947), less than the proffered wage.⁶ Forms DE-6 indicated 12-16 employees and did not include any wages paid to the beneficiary. The petitioner submitted bank statements for periods ending from November 20, 2002 to

⁴ The California Board designated these as the national physical therapy examination (NPTE) and the California laws examination (CLE). Initial evidence included notices dated October 3, 2002, by which FSBPT limited the eligibility for tests of the CLE and NPTE between October 4 and December 3, 2002. A third FSBPT notice, dated May 9, 2003, set the beneficiary's further NPTE between May 10 and July 9, 2003.

⁵ Though the California Board acknowledged the beneficiary's success in the CLE examination of October 19, 2002 (CLE letter), it emphasized, once again, that the beneficiary must also pass the NPTE before attaining the status of a physical therapist license applicant in order to perform the required period of clinical service. See California Board Notice, dated November 4, 2002 (November 4, 2002 notice).

⁶ Current assets include cash, receivables, marketable securities, inventories, and prepaid expenses, generally, with a life of one year or less. Current liabilities consist of obligations, such as accounts payable, short term notes payable, and accrued expenses, such as taxes and salaries, payable within a year or less. See *Barron's Dictionary of Accounting Terms* 117-118 (3rd ed. 2000). If net current assets meet or exceed the proffered wage, the petitioner has demonstrated the ability to pay it for the period.

November 30, 2003.⁷ The average daily balances ranged between \$89,242 as of January 21, 2003 and \$911,894 as of November 20, 2002. Their median was \$193,706, and its effect appears below.

In reaching a decision, the director remarked on the contents of the notice of job opportunity that the petitioner had posted October 1, 2002 (the posting notice), before it filed the petition on November 15, 2002. The posting notice stated that the position justified an hourly rate of \$21 and required both a bachelor's degree in physical therapy and one (1) year of work experience in the job. In the response of January 15, 2004 to RFE-2, the petitioner conceded that the prevailing wage rate was \$36.11 and that the petitioner might not be able to prove one (1) year of prior experience. The petitioner volunteered to amend the ETA 750, prospectively, to increase the proffered wage to \$36.11, to eliminate the one (1) year requirement, and to add a special requirement, in Part A, block 15 of Form ETA 750. Thus, prospectively, block 15 would add that the beneficiary "Must be a license (sic) Physical Therapist in the State of California OR Have Authorization to Test (ATT) letter issued by the Federation of State Boards of Physical Therapy (FSBPT)." See correspondence of Ms. Rukhsana Omar, Human Resources Manager, dated December 3, 2003 (the petitioner's amendments).

The director determined that CIS could not reaffirm or certify the ETA 750, because the petitioner failed to post an amended posting notice or to present a properly executed, uncertified Form ETA 750, as amended, before the filing of the I-140 petition. In short, the posting notice adversely affected qualified job seekers who might have applied. The amendments might have attracted United States applicants, if ever the petitioner had made a timely posting notice, prior to filing the Form ETA 750 and I-140 petition.

Also, the director reviewed the bank statements and determined that the bank certification did not recognize balances less than the proffered wage and did not precisely state balances. The analysis confirmed that the taxable income and the deficit of net current assets were less than the proffered wage and did not establish the petitioner's ability to pay the proffered wage. Also, the director denied the petition because the petitioner did not meet requirements to justify the certification of its amended Form ETA 750 before filing the I-140 petition, did not post a correct posting notice, and did not demonstrate the eligibility of the beneficiary.

Counsel, on appeal, states:

Petitioner could have easily posted an amended [posting] notice in response to an [sic] subsequent RFE issued by [CIS]. There was no reason, and no authority, to deny the petition on this basis.

On the contrary, a petitioner must establish the elements for the approval of the petition as of the priority date, in this case the filing of the I-140 petition. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

These proceedings do not document that the petitioner posted notice to its employees or to the bargaining representative in regard to the amended Form ETA 750. The statute and regulations do not treat this as a minor matter subject to every casual plan.

The regulation at 20 C.F.R. § 656.20(g) provides especially as to the rate of pay:

⁷ They included statements for atypical dates, such as November 20, 2002 and January 21, 2003, but none for August 31, 2003.

- (1) If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay.

Counsel construes a duty on CIS to issue an RFE to allow amendments that the petitioner wholly volunteers after the priority date, but cites no authority. The statute and regulations, however, impose on the petitioner the duty to post the posting notice and to provide the opportunity for applicants to apply and for others to present documentary evidence.

The regulation at 20 C.F.R. § 656.20(g)(3) simply states that:

Any notice of the filing of an Application for Alien Employment certification shall:

- (i) State that applicants should report to the employer not to the local Employment Service Office;
- (ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (iii) State that any person may provide documentary evidence bearing on the application to the local Employment service Office and/or the Regional Certifying Officer of the Department of Labor.

These provisions serve the expressed purpose to provide U.S. workers at the location of the intended employment with a meaningful opportunity to compete for the job and to assure that the wages and working conditions of United States workers similarly employed will not be adversely affected by the employment of aliens in Schedule A occupations. *See* the Immigration Act of 1990, Pub.L. No. 101-649, § 122(b)(1), 1990 Stat. 358 (1990); *see also* Labor Certification Process for the Permanent Employment of Aliens in the United States and Implementation of the Immigration Act of 1990, 56 Fed. Reg. 32,244 (July 15, 1991).

Counsel insists that the petitioner need not file a new petition, if only CIS, after the entry of its decision, will allow the petitioner to work amendments at will on its own posting notice, its own Form ETA 750, and its own I-140. The regulations do not support this treatment of the Form ETA 750 that was executed and submitted with the I-140 for classification as a Schedule A occupation. *See also supra* notes 1-3. The petitioner's willful amendment of the Form ETA 750 defeats every purpose of these provisions, and they do not provide for such amendment.

In *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977), CIS stated persuasively, in like circumstances:

When a sixth-preference petition is filed, it seeks to establish that the employer is making a realistic job offer to an alien who is qualified, and that the proposed employment will not displace United States workers at the time the petition is filed.

Additionally, in evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The I-140 petition was not accompanied by evidence that petitioner qualified the beneficiary for classification under 20 C.F.R. § 656.10, Schedule A, Group I, as of the priority date of the petition. Subsequent evidence did not claim to establish eligibility under the I-140 for Schedule A classification, but only under a host of amendments. As to them, the petitioner did not comply with the instructions stipulated in the Department of Labor regulations, at the time of the filing of the petition, and the petition may not be approved.

Beyond the decision of the director, the evidence supports the threshold requirement that the employer, when filing the I-140 petition and seeking a labor certification for a physical therapist, must file a statement of an authorized State physical therapy licensing official in the State of intended employment. It must aver that the beneficiary has qualified to take, in this case, the CLE, as of the priority date, November 15, 2002.⁸ *See* 20 C.F.R. 656.2(c)(1).

Beyond the threshold requirement, both the August 21 and November 4, 2002 notices of the California Board required a successful result in the NPTE by August 20, 2003 or a new application.⁹ These notices limited the beneficiary to practice as a physical therapist aide in the meantime. This capacity does not conform to the job offer that the petitioner made in Form ETA 750, and the Board's ATT expired on August 20, 2003. Though it is not a basis of this decision of the AAO, the petition may not be approved for this additional reason.

As already noted, in evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Statutory provisions of § 204(b) of the Act, 8 U.S.C. 1154(b) dictate that:

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General shall, if he determines that the facts stated in the petition are true and that

⁸ The ATT, dated October 3, 2002, was valid until November 3, 2002, and, thus, the petitioner established the beneficiary's qualification to take the CLE on October 19, 2002, before the priority date. The beneficiary passed the CLE.

⁹ Though it is beyond the decision of the director, the proceedings reflect no new ATT, nor result for the NPTE, nor new application to the California Board since August 20, 2003.

the alien in behalf of whom the petition is made is . . . eligible for preference under subsection (a) or (b) of section 203, approve the petition. . . .^[10]

The AAO reviews cases on a *de novo* basis. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO may consider technical requirements of the law and deny the petition, even though the director's initial decision may not reflect all grounds for denial. See *Spencer Enterprises, Inc. v. United States*, 299 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003).

Separately, the branch of the evidence to do with the ability to pay the proffered wage does not justify the approval of the petition. Counsel draws attention to the average daily balance reflected on bank statements of January 21 and 31, 2003, respectively, \$89,242 and \$182,154. It may be added that the average daily balance as of November 20, 2002, near the priority date, was \$911,894 and on December 18, 2002, near the end of 2002, was \$591,787. These balances are equal to, or greater than, the proffered wage.

These impressive bank balances conflict, however, with Schedule L of the 2002 Form 1120. It shows no cash and no current assets at all and a deficit of net current assets of (\$263,947) as of December 30, 2002. The failure of the tax returns to report such large assets seriously contradicts the evidentiary value of bank statements and any other claim of assets for the petitioner as of the priority date.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel concludes, in the brief on appeal, that the petitioner was, at all times after the priority date, clearly able to pay the prevailing wage and that CIS erred in concluding otherwise. To the contrary, the petitioner created conflicting evidence, with its selected bank statements and its 2002 Form 1120, and has provided no credible explanation to resolve it.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

¹⁰ The Secretary of Homeland Security and CIS now determine this eligibility pursuant to the I-140 visa petition under statutory authority and pertinent delegations, rather than the Attorney General.

After a review of the 2002 Form 1120 with Schedule L, bank statements as of the priority date, the bank certification, Forms DE-6, the posting notice, and the petitioner's amendments, it is concluded that the petitioner has not established that it had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. Moreover, the petitioner has not qualified the beneficiary for a Schedule A classification under the Form ETA 750, as filed with the I-140.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.